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In the Supreme Court of the United States.

OCTOBER TERM, 1957

WILLIAM EPSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 2a–14a) is at 246 F. 2d 563.

JURISDICTION

The judgment of the Court of Appeals was entered on July 2, 1957. (Pet. 1a.) On July 24, 1957, by order of Mr. Justice Brennan, the time for filing a petition for a writ of certiorari was extended to August 31, 1957. (Pet. 15a.) The petition was filed August 30, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict.

2. Whether the Court erred in instructing the jury that on the question of intent it could consider evidence that in pre-indictment years petitioner omitted substantial amounts of income from his returns.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

STATEMENT

On February 21, 1956, an indictment in four counts was returned against petitioner in the United States District Court for the Western District of Tennessee charging willful attempted evasion of income tax for

each of the years 1949 through 1952 by filing false and fraudulent returns in violation of Section 145 (b) of the Internal Revenue Code of 1939. (R. 1a.)[1] The amounts of petitioner's reported and correct net income and tax liability as alleged in the indictment were as follows (R. 48a; Supp. R. 91b–92b):

Year	Reported		Corrected	
	Income	Tax	Income	Tax
1949	$20,105	$4,278	$60,633	$22,844
1950	37,142	11,225	66,358	26,874
1951	16,526	3,866	69,325	32,303
1952	14,395	3,492	38,792	14,848

After a jury trial, petitioner was found guilty as charged. (R. 255a.) On June 26, 1956, he was sentenced to imprisonment for five years on each count, the sentences to run concurrently, and fined a total of $25,000. (R. 1a, 256a.) The Court of Appeals affirmed. (Pet. 2a–14a.)

The evidence to support the verdict may be summarized, briefly, as follows:

During the prosecution years (1949–1952), and for 25 years prior thereto, petitioner operated a pawnshop and an adjacent merchandise store in Memphis, Tennessee.[2] For three years prior to 1924, he conducted a pawnshop in partnership with one Nathan Karnowsky.

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[1] The record consists of the appendices to the briefs in the Court of Appeals. The appellant's appendix is designated herein as "R." The Government's appendix is designated "Supp. R."

[2] In addition, petitioner made numerous investments (Pet. 17a–18a), and was a partner in a dry goods store located in Osceola, Arkansas (Supp. R. 36b–37b).

From 1912 until 1921, he was employed in various pawnshops in Memphis, with the exception of three years which he spent on a family farm in Arkansas, and a period of military service during World War I. (R. 118a–120a.) From June 1937 until April 1949, the merchandise store was conducted in the name of petitioner's father-in-law, J. P. Kirschner. Petitioner, however, continued to operate the business, and although the income therefrom was admittedly (Pet. 26) taxable to petitioner, it was omitted from his returns and reported in income tax returns filed by Kirschner. During that period, a state law was in effect which prohibited pawnbrokers from maintaining any other business in the same building or one adjoining that in which their pawnshop was located. (R. 64a–65a, 121a–122a, 128a–130a.)

Petitioner's pawnshop and merchandise business consisted largely of cash transactions. (R. 15a; Supp. R. 80b.) His record of the receipts and expenditures of the two businesses for the years in question consisted of "a little book" in "memorandum form". (Supp. R. 10b.) The entries in the book were made once a month by a public accountant, Louis T. Weis, principally from a "memorandum" submitted by petitioner. (Supp. R. 121b–122b.) Petitioner's income tax returns for the years involved were prepared by another public accountant, Wallace C. Summers. In preparing the tax returns, Summers took the figures for business receipts and expenses from the book maintained by Weis. (R. 7a–8a; Supp. R. 7b–11b.) On several occasions during the prosecution years,

Summers advised petitioner (Supp. R. 10b) "to keep more accurate books and records" for his business. In the course of the investigation, which disclosed expenditures by petitioner and his wife greatly in excess of reported income for the years in question, Summers agreed with the agents that many of the entries in the petitioner's books could not be verified; that petitioner's records "were not adequate" nor "sufficient to prepare a correct income tax return" (Supp. R. 80b); and that under the circumstances "the best means available" to determine his true income was the net worth method (Supp. R. 77b).

The prosecution's case was based upon the net worth method of proof. The evidence showed that during the years 1949 through 1952, petitioner's net worth increased from $246,000 to $403,000, and that, based upon the increases in net worth plus nondeductible expenditures, his true net income for the four-year period aggregated $235,000, whereas his reported net income for the period totaled only $88,000, a difference of some $147,000. (Supp. R. 97b, 100b.) The assets, liabilities, and expenditures included in the net worth determination were not disputed by petitioner, with the exception of the item of undeposited cash on hand. (Compare Exs. G (1) and G (2) reproduced in the appendix to the petition, pp. 17a–18a.)

The defense was a belated claim of a cash hoard on hand at the beginning of the prosecution period sufficient to account for most of the bulge in petitioner's net worth during the prosecution years. In the Government's net worth computation, petitioner was credited with an opening net worth of $246,000, including

an item of undeposited cash on hand in the amount of $20,000. He claimed a cash hoard on hand at the end of 1948 of approximately $130,000. This cash hoard, according to petitioner, was accumulated entirely out of earnings in pre-indictment years and consisted of (1) the item of $20,000 with which he was credited by the prosecution, (2) the sum of $82,739 which he claimed he segregated and saved during the period the merchandise store was operated in the name of his father-in-law, Kirschner, and (3) alleged savings of his wife in the amount of $27,116. (R. 118a–127a, 200a–213a; Ex. G (1), Pet. 17a.) Petitioner, admittedly, never received any gifts or inheritances. (Supp. R. 83b, 112b.) The cash hoard was allegedly kept in a safe in petitioner's pawnshop. According to the defense testimony, the door to the safe was left upon and the cash hoard was visible to "anybody that walked in his establishment." (R. 39a–40a, 122a–123a, 127a–128a.) Petitioner did not take the stand.

The prosecution presented a large body of evidence which negatived the possession by petitioner and his wife on the critical date of undeposited cash in excess of the $20,000 with which he was credited. In the course of the investigation, petitioner told Special Agent Norris that he never had more than $20,000 in undeposited cash on hand. Prior thereto, he had stated to Revenue Agent Huddleston that the largest amount of cash he ever had at one time was between $35,000 and $40,000. (R. 15a, 41a, 77a; Supp. R. 112b, 114b.) Financial statements submitted by petitioner to his bank in support of loan applications showed

undeposited cash on hand as of December 31, 1946, and December 31, 1949, of less than $20,000. (R. 52a–53a.) Financial reports submitted by petitioner to Dun and Bradstreet in 1943, 1944, 1945, and 1947 reflected undeposited cash on hand in varying amounts up to $20,000. (Collective Ex. 1 to Mason, R. 31a.) In fact, it was not until after the investigation had been substantially completed, and petitioner had been informed by the agents of the approximate amount of unreported income for the period reflected by the net worth determination, that petitioner laid claim to a cash hoard of $130,000. (Supp. R. 69b–83b, 85b–87b, 101b.) Moreover, both prior to and during the prosecution years, petitioner frequently borrowed money from the Union Planters Bank in Memphis, although he was allegedly in possession of a cash hoard in excess of $100,000. From 1947 through 1952, the interest paid by petitioner on these bank loans totaled $6,702. (Supp. R. 23b–30b.) In addition, the evidence relating to petitioner's financial history revealed that in the pre-indictment years the expenditures of petitioner and his wife were substantially in excess of their available funds based upon reported income, including the income of the merchandise store reported in the returns filed by petitioner's father-in-law. The income reported by petitioner and his wife for the years 1920 through 1948,[3] plus the income re-

[3] During this period, petitioner did not file an income tax return for some years. In computing petitioner's available funds, the agents assumed that in the years in which no return was filed, petitioner had a gross income in the maximum amount which would not require filing a return. (R. 75a.)

ported by petitioner's father-in-law during the period in which the merchandise store was conducted in his name, aggregated some $484,000, whereas during the same period the known expenditures of petitioner and his wife totaled $514,000. (R. 72a–75a; Supp. R. 109b–112b; Ex. G (5), Pet. 20a.)

The prosecution also established that for the four years immediately preceding the prosecution period (1945–1948), petitioner reported an average net profit from the operation of his pawnshop and merchandise business of $34,675. During the prosecution years, his reported net profit from this source averaged only $8,103 a year. (R. 68a–69a; Ex. G (4), Pet. 20a.)

The court instructed the jury, in part, as follows (R. 225a, 226a):

> On the question of intent, concerning any particular phase of the case, the jury may consider whether the defendant acted in good faith upon the advice of legal counsel, after a full disclosure of all the facts to his legal counsel. And the Court instructs you, with respect to the separation of what has been referred to in the trial as the Kirschner Sales Store from the defendant's pawn shop, as required by an act of the Tennessee Legislature, that this is a matter you may consider on that phase of the case which deals with the filing of a separate tax return for the sales store and whether or not the defendant in filing a separate return or permitting such a separate filing willfully intended to evade by fraudulent means his just taxes for any given tax year under consideration in this case.
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> * * * * *

Further, in an effort to be helpful, the Court instructs you on the question of willfulness or intent to evade income taxes, by way of illustration and not by way of limitation, there are certain matters which you might consider, pointing to intent, so far as tax evasion is concerned, if you find any one of them existed in this case: Concealment of assets, covering up or concealment of sources of income, handling one's affairs to avoid the making of usual records, and any conduct, the likelihood of which would be to mislead or conceal. I might say here, it is not permissible under the tax laws for one who owns more than one business to split or lessen his income tax liability by filing or permitting the filing of a separate return for one of such businesses, even though the return is made out and filed in the name of a third person.

ARGUMENT

1. Petitioner challenges (Pet. 11–28) the sufficiency of the net worth proof on two grounds: He contends that the prosecution (a) failed to establish his opening net worth with reasonable certainty, and (b) failed to adduce evidence of a likely source of unreported income to which the net worth increases could be attributed. Neither of these contentions has merit.

(a) With respect to opening net worth, petitioner's contention (Pet. 19–28) amounts to no more than a complaint that the prosecution failed to credit him with the alleged cash hoard. Petitioner claims (Pet. 23, 25) that in addition to the undeposited cash in the amount of $20,000 with which he was credited by the

prosecution, he had on hand at the beginning of the prosecution period $82,739, representing accumulated earnings of the merchandise store for the period in which this business was conducted in the name of, and the income therefrom reported by, his father-in-law, Kirschner, plus savings of petitioner's wife in the sum of $27,116. The existence of the alleged cash hoard in the amount claimed was a question of fact for the jury. As is apparent from the verdict, it resolved this question against petitioner. Suffice it to note that here, as in *Holland* v. *United States*, 348 U. S. 121, and *Friedberg* v. *United States*, 348 U. S. 142, there was a large body of evidence, *supra*, pp. 6–8, negativing the possession by petitioner on the critical date of a cash hoard in excess of the amount credited by the prosecution. This evidence revealed a thorough and painstaking investigation of petitioner's financial and reporting history going back to 1913, at which time petitioner was 19 years of age. Although petitioner claimed that the cash hoard was accumulated out of earnings in pre-indictment years, the evidence belied the claim. The record shows that from 1920 through 1948, petitioner and his wife had expended sums substantially in excess of their reported income for this period, including the income from the merchandise store reported by petitioner's father-in-law. This evidence provided ample corroboration of petitioner's extra-judicial admission to the investigating agents that he never had more than $20,000 or $40,000 in undeposited cash at any time. *Smith* v. *United States*, 348 U. S. 147; *United States* v. *Calderon*, 348 U. S. 160.

(b) Petitioner's contention (Pet. 11–19) that the evidence fails to reveal a likely source of income to which the net worth increases could be attributed ignores the facts of record. The evidence established, *supra*, pp. 3–5, 8, that during the prosecution years petitioner not only owned and operated a profitable pawnshop and merchandise business, but that the business was capable of producing much more income than was reported by petitioner. Such a showing is sufficient to support the inference that petitioner's net worth increases were attributable to currently taxable income. *Holland* v. *United States*, *supra*.

Contrary to petitioner's assertion (Pet. 14), this case does not present the same question now pending before this Court in *United States* v. *Massei* (No. 98) and *Ford* v. *United States* (No. 82) on writs of certiorari to the Courts of Appeals for the First and Second Circuits, respectively. Here, unlike the situation in the *Massei* and *Ford* cases, which involved salaried employees, the Government offered direct affirmative proof of a likely source to support the inference that the net worth increases were attributable to currently taxable income. Petitioner's reliance on *Thomas* v. *Commissioner*, 232 F. 2d 520 (C. A. 1st), a civil fraud case involving net worth proof, is misplaced. Petitioner recognizes (Pet. 18, fn. 17) that in the *Thomas* case the court emphasized that there was no evidence that the taxpayer's business was capable of producing substantially more income than was reported. Here there was such evidence.

2. There is likewise no merit in petitioner's contention (Pet. 28–31) that the court erred in instruct-

ing the jury that on the question of intent it could consider petitioner's conduct in omitting from his returns in pre-indictment years the income from the merchandise store. Petitioner concedes (Pet. 26) that the income from the merchandise store, which was reported by his father-in-law from 1937 until 1949, was taxable to and should have been reported by him. Petitioner assumes (Pet. 30), however, that his conduct in omitting this income from his returns could not have constituted attempted income tax evasion as well as an attempt to conceal his ownership of the store in violation of local law. Accordingly, citing *Boyd* v. *United States*, 142 U. S. 450, and *Johnson* v. *United States*, 318 U. S. 189, 195,[4] petitioner argues (Pet. 29) that the court below erred in failing to apply the principle that "other wrongs, unrelated to the offense charged, cannot be considered in determining the guilt of an accused". Whether petitioner intended to evade his income taxes in omitting the store's income from his returns for prior years was, of course, a question of fact which was properly left for determination by the jury. In any event, petitioner's acts in omitting the store's income from his prior returns and his acts

[4] In *Johnson* v. *United States*, 318 U. S. 189, where, as here, the defendant was charged with income tax evasion, inquiry into his receipts prior to the prosecution years was held to be proper to show the continuous nature of his income during the prosecution years; in *Boyd* v. *United States*, 142 U. S. 450, 454, evidence of the defendant's previous offenses which "had no necessary connection with, and did not, in the slightest degree, elucidate the issue before the jury" was held inadmissible. In *Nye & Nissen* v. *United States*, 336 U. S. 613, 618, this Court held that evidence of similar and related offenses tending to show a consistent pattern of conduct was admissible to show intent.

directly in issue—namely, the omission from his returns for the indictment period of income from the store and pawnshop—were certainly of a kindred character. Applicable here, therefore, is not the principle which taxpayer would invoke, but rather the long-settled rule, as stated by this Court speaking through Mr. Justice Story in *Wood* v. *United States*, 16 Pet. 341, 358–360, that:

> where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment. Indeed, in no other way would it be practicable, in many cases, to establish such intent or motive, for the single act, taken by itself, may not be decisive either way; but when taken in connection with others of the like character and nature, the intent and motive may be demonstrated almost with a conclusive certainty. * * *
>
> They constitute exceptions to the general rule, excluding evidence not directly comprehended within the issue; or rather, perhaps, it may with more certainty be said, the exception is necessarily embodied in the very substance of the rule; for whatever does legally conduce to establish the points in issue, is necessarily embraced in it, and therefore, a proper subject of proof, whether it be direct or only presumptive. * * * The same doctrine has been held in cases of the uttering of bad money and spurious notes * * *.

> Cases of fraud present a still more stringent necessity for the application of the same principle; for fraud, being essentially a matter of motive and intention, is often deducible only from a great variety of circumstances, no one of which is absolutely decisive; but all combined together may become almost irresistible as to the true nature and character of the transaction in controversy. * * *

See also II *Wigmore on Evidence* (3d ed.), Secs. 302 and 321 (2) (c). Under the circumstances, therefore, the trial court's instruction on this issue was entirely proper.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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